

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Nonselection



.....
In the Matter of

U.S. DEPARTMENT OF LABOR

Case No. 84-JPT-11

v.

NATIONAL URBAN INDIAN COUNCIL,
INC.

.....
James W. Aiken, Esquire
For the Complainant

Vincent C. Constantino, Esquire
For the U.S. Department of Labor

DECISION AND ORDER OF REMAND

Statement of the Case

This proceeding arises under section 166(a) of the Job Training Partnership Act (hereinafter JTPA), 29 U.S. §1576, and the implementing regulations at 20 C.F.R. Part 636. This is the result of an appeal of the National Urban Indian Council (hereinafter NUIC) of its non-selection as a Native American grantee for Fiscal Year 1984. Pursuant to §636.10 of the regulations, a hearing was held on May 14, 1984 in this matter.

Findings of Fact and Conclusions of law

Background

The Division of Indian and Native American Programs (DINAP) is part of the Office of Special Target Programs in the U.S. Department of Labor. DINAP is charged with administering the Job Partnership Training Act (JPTA) as it affects Indians and other Native Americans. Previously DINAP was in charge of administering the Comprehensive Employment and Job Training Act with regard to these groups. There is little difference in the provisions of CETA and JPTA in the provisions affecting Indians and Native Americans.

Part of **DINAP's** operations consists in reviewing applications for grants submitted by various organizations to administer JPTA programs. This review is a two tiered operation (1) a determination whether the applying organization is qualified to administer a JPTA program and (2) a review of the proposed program and the funding level. Only step (1) **was** involved in this controversy.

In order to determine the qualifications of prospective grantees DINAP publishes a Solicitation of Notice of Intent (SNOI) in the Federal Register requesting interested parties to submit their applications detailing their qualifications. The SNOI is very specific about the information which is to be supplied and also sets a deadline for the receipt of the **ap**pli-cations.

After the applications are received by DINAP they are logged in and assigned by Herbert **Fellman**, the head of the division, to one of three supervisors who in turn assign them to federal representatives who evaluate them in accordance with the instructions on a check list. Their recommendations are forwarded to a supervisor who evaluates them. Instruction No. 3 to the federal representatives and supervisors reads as follows:

3. If document and/or information is unsatisfactory, contact the applicant by telephone and request submission of the required of corrected documents and/or information ASAP. Record the telephone conversation on standard DINAP form and include it with the Notice of Intent package. (emphasis in original)

After the supervisors have completed their review they submit, their recommendations to **Fellman** who sends them up to **Mayrand**, head of the Office of Special Target Programs for final approval. In cases where more than one organization applies for the same geographical area the application of the competing organizations are sent to a three-member panel who rate them. Under JPTA and the regulations organizations run by Indians and Native Americans are given preference in grant administration. After the review is completed applicants are informed of their selection or **non**-selection.

Findings of Fact

The Complainant, the National Urban Indian Council, is non-profit association of organizations of Indians and of individual Indians. Its Chief Executive Officer is Gregory Frazier, an American Indian. It was organized in 1976 and has had contracts with the Department of Labor under first CETA and the JPTA for several years past.

On May 27, 1984 DINAP published a SNOI inviting organizations interested in administering **FY '84** funds to state their intent to do so by **June 17, 1983** and to provide certain information. Among the information requested was the following:

(1) A description of the geographic area or areas which the applicant proposes to serve together with the **Indian** and Native **american** population in such areas to the extent known and the source of the population information. The description must include a list of States (if more than one) in alphabetical order, and under each State a list of counties in alphabetical order, followed by a list of tribes, bands or groups (if any), in alphabetical order, and the square mileage of the requested services area.

Complainant responded by filing three **NOIs**, one for the State of Utah, one for the State of Ohio and one for "**any** geographic area where no Indian or Native American group has applied for program year **1984** funds and designations". The controversy here involves the "**any geographic area**" **NOI**.

Complainant's **NOI** for Utah and Ohio were approved by September 15, 1983. When it failed to hear about the decision on its "**any geographic area**" **NOI** it inquired of **Fellman**. In investigating **Fellman** discovered that that **NOI** had been filed with the duplicates of **Complainant's** Utah application rather than logged in for assignment, i.e. it never had been evaluated by anybody. By the time this error was discovered the evaluation of **NOIs** had been completed and applicants informed of the result, but **no funds** had yet been committed.

After this discovery **Fellman** consulted his supervisor **Mayrand**, Grant Officer Goldberg and unidentified members of the Office of the Solicitor of Department of Labor (SOL). **Fellman** gave the matter to his staff assistant **McVeigh** to research. After consultation, which was limited to these individuals and did not include any federal representatives or their supervisors, it was decided that, because the **NOI** failed to specify the States and/or counties for which Claimant was applying, it was deficient on its face and would have been denied outright had it been one of the **NOI's** considered. Accordingly Goldberg wrote Frazier on October 11, 1984 that his **NOI** was not considered because it failed to describe the geographic area as required by the SNOI. This proceeding is the appeal from this failure to consider Complainant's **NOI**.

Issue

Was **DINAP's** failure to consider Complainant's **NOI** arbitrary and capricious.

Discussion

Initially Claimant takes the position that its **NOI** was in **acceptable** from when it was filed and should have been approved as submitted. I do not agree. The SNOI required that the geographical area should be specified. **Fellman** testified **credibly** and convincingly that such specificity was required to assess the qualifications of the applying organizations to serve the areas in which they were interested. Even if during the application period for FY '84 the areas not served by Indians and Native Americans could have been readily identified, as Claimant urges, this would not necessarily be the case in future years, when more than one such NOI might be submitted **i.e.** accepting **NOIs** in the form submitted by Claimant would **have** created a precedent which could have left **DINAP** in a bad administrative posture. Accordingly, I find that **DINAP's** insistence that the geographic areas to be served be identified as required by the SNOI before an **NOI** is considered acceptable and ratable is not only not capricious or arbitrary but makes good sense.

This conclusion would end the controversy but for the fact that under **DINAP's** own procedures the submission of an unacceptable **NOI** does not automatically disqualify the applicant. Under **DINAP's** own regulations for evaluating **NOIs** the federal representatives and their supervisors are instructed to contact the applicants by telephone to see whether the defect can be remedied. Complainant insists that had its application been considered when it was filed it would have been entitled to such contact, and had it gotten such a call it would have done its best to come up with specific areas. **Fellman**, **Goldberg** and **Mayrand** testified that they considered the application so defective that it could not possibly be cured by further discussion with Claimant. Peg Cosby, a field supervisor, and Peter Homer, deputy director of **DINAP** until two weeks after the hearing and a former supervisor of federal representatives, testified that they would surely have called Complainant if they had considered his application defective. 1/ **Herman Narchos**, another supervisor, first testified that **he would** not have called, then stated on cross examination he might have called and then again testified that he would not have called.

1/ Cosby thought the application was defective, Homer thought not.

Initially I view the position that no call would have been made with **suspicion** because- of the way the application was treated once the misfiling was discovered. Instead of putting all further processing and funding of the FY '84 NOI's on hold while the application at issue was evaluated by the federal representatives or at least by one, of their supervisors the matter was assigned for research to an administrative assistant, **McVeigh**, and became the subject matter of high level conferences including **SOL** staff members to figure out what to do in the face of this embarrassment. **McVeigh** was not produced to testify on the nature of his assignment and **Fellman** left the hearing before I could recall him to inquire further in light of the testimony adduced during the hearing. 2/ This entire procedure raises the strong suspicion that **once** the misfiling was discovered the whole emphasis was on finding a face-saving way out of the embarrassment and not on a bona fide evaluation of the **NOI** on its merits.

This suspicion is confirmed by the testimony of Cosby and Homer both of whom testified that they would have called Frazier to ask him to correct Complainant's **NOI**. **Fellman**, Goldberg's and **Narchos**' testimony that no call would have been made because **DINAP** could not have supplied Frazier with the information he sought, i.e. for which areas other Indians had not applied is unpersuasive for two reasons (1) the information was available while the **NOIS** were being reviewed and (2) if the information either was not available or **DINAP** did not wish to reveal it, Complainant, if notified of the **unacceptability** of its **NOI** would have had an opportunity to decide whether it wished proceed **in** its usual fashion of applying and then withdrawing if it found itself competing with another Indian organization. Frazier testified credibly that he had expected such a call if his novel **NOI** was found unacceptable and that he **would** have been prepared to proceed to file for specific area-based on as much information as he had been able to gather.

Another factor which leaves me to conclude that Claimant's application was not considered on its merits is the fact that Complainant and Frazier had been grantees of DOL both under CETA and JPTA since 1973. Frazier was well known to **DINAP**, visited there frequently on business, had been requested to take over a Utah grant when the initial grantee failed to perform and had **2 NOIs** for fiscal '84 accepted. It stretches

2/ **Fellman** was **DINAP's** lead-off witness and was present during most of the hearing but left before its conclusion.

credulity to the breaking point to be asked to believe that an **NOI** of such an organization would have been denied out of hand without at least some discussion of remedying the **shortcomming**. This is especially true as the State of Ohio which had submitted on **NOI** much more deficient than that submitted by Claimant was helped in producing an acceptable **NOI**.

The Grant Officer cites Deputy Chief Judge Thomas decision in Indian Human Resources Center Inc., **83-JPT-4** in support of its argument that because the **NOI** in question was submitted on the last possible date it was, in any event, too late to seek additional information prior to rating the **NOI**. I do not believe this decision is opposite here nor do I find it entirely persuasive. That case involved the submission of an amended **NOI**, not the provision of additional information for the original **SNOI**. Judge Thomas explicitly indicated that he considered supplying post closing information permissible. The case dealt with **the** consideration by a rating panel of two **NOIs** in which one of the applicants had been given the opportunity to make changes and the other one had not. Here the rating panel stage had not been reached. There is no showing here at all that there were other applicants who would have been prejudiced by giving Complainant the opportunity to provide the missing information or that such competing applicants would not have been given the opportunity to respond.

Nor is there any showing that rating panels are convened as soon as the date for receipt of **NOIs** had passed. On the contrary it is evident from Judge Thomas' decision in Indian Human Resources and from the three months time lag between the closing deadline for **NOIS** and the designations here that work to get applications to conform with the **SNOI** took place after the filing deadline. **Moreover**, the original **NOI** filed in Indian Human Resources was considerably more defective in **set-ting** forth material facts than the **NOI** filed by Complainant **here 3/**, so that it cannot be assumed that Judge Thomas would have **reached** the same conclusion here as he **did** in Indian Human Resources. I believe that, absent **explicit** statutory

3/ The contested award in Indian Human Resources was made in **the** same time frame as is covered here. Although the testimony of **Mayrand** and **Goldberg**, cited by **Judge** Thomas in the Indian Human Resource decision, contradicted their testimony as to how **DINAP** dealt with defective applications I have based my findings herein solely on the evidence adduced at the hearing of this complaint.

and regulatory requirements not present at the evaluation of the NOI under consideration, it is within DINAP's administrative discretion to seek !a **post-filing** deadline information from applicants with regard to their responses to the SNOI-. Having set-up such a correction mechanism DINAP is then under **an obligation to use it** even handedly in reviewing all applications. DINAP clearly has failed to do so here.

Conclusion

For the reasons set forth above I conclude that **Complainant's NOI** was not considered on its merits **but was** rejected to avoid the embarrassment of the misfiling and the consequent **need for** reconsideration and possible revocation of the designations already made **4/** which would have resulted had the application been submitted to the established correction process and had then **been** considered on its merits. Accordingly I find that **DINAP's** refusal to subject the application of Complainant to the established correction process and **DINAP's** consequent failure to rate the **NOI** was arbitrary and capricious and cannot be sustained.

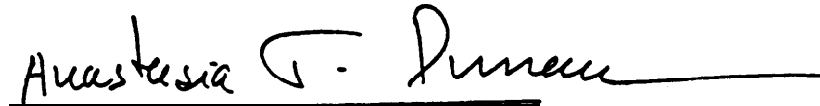
Remedy

Both parties agree that if I find that Complainant's **NOI** was improperly processed, the proper remedy is to remand the case to the Grant Officer. Upon receipt of the Remand Order the Grant Officer is to request Complainant to specify the geographical area it wishes to serve and to consider the application as so corrected. If there is any applicant with whose **NOI** that of Complainant might compete and such organization has not yet had an opportunity to perfect its **NOI** by providing additional information it is to be permitted to do so. After all parties have perfected their **NOIs** as indicated above the Grant Officer is to rerate their application.

4/ There is evidence that Complainant's might very well have successfully competed in five States where awards were made to organizations not controlled by Indians or other Native Americans.

-ORDER

It is ordered that this case be and it hereby is remanded to the Grant Officer for processing as outlined above.



ANASTASIA T. DUNAU
Administrative Law Judge

Dated: **NOV 14 1984**
Washington, D.C.

ATD:pas

SERVICE SHEET


Case Name: US DEPT. OF LABOR-v- NATIONAL URBAN INDIAN COUNCIL

Case No.: 84-JTP-11

Document Issued: Decision & Order of Remand

NOV 14 1984

I, Paula A. Shipp, certify that on _____ the above named document was mailed to the last known addresses of each of the following parties and their representatives:


PAULA A. SHIPP

Legal Technician

REGULAR MAIL

James W. Aiken, Esq.
National Urban Indian Council
1001 Etna Plaza
Seattle, WA 98121

Gregory W. Frazier
Chief Executive
National Urban Indian Council
2258 South Broadway
Denver, CO 80210

Vincent C. Constantino, Esq.
Harry Sheinfeld, Esq.
U.S. Department of Labor
Room N2101
200 Const., Ave., N.W.
Washington, D.C. 20210

Herbert Fellman, Chief
DINAP/ETA
601 D St., NW
Washington, D.C. 20213

Melvin Goldberg
Grant Officer
Office of Contracting
U.S. Dept. of Labor/ETA
601 D St.; N.W.
Washington, D.C. 20213

Tedrick A. Housh, Jr. --
Regional Solicitor
2106 Federal Office Bldg.
911 Walnut St.
Kansas City, MO

David O. Williams
office of the Special Counsel
U.S. Dept. of Labor/ETA
601 D St., NW, Rm. 5100
Washington, D.C. 20213

Douglas Cochennour, Director
Division of Financial Policy
Audit & Closeout
U.S. Dept. of Labor
601 D St., NW
Washington, D.C. 20213